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Street art, graffiti and the moral right of integrity:

Can artists oppose the destruction and removal of their works?

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The relatively recent boom of street art and graffiti in many cities around the world animates and brings attention to the debate around their conservation. Can artists within these communities use the legal tools offered by moral rights laws to preserve their art? This note addresses this issue and, in particular, expands on whether street artists and graffiti writers can rely on moral rights regimes to prevent the destruction or removal of their works. It does so by looking at recent cases, especially in the US, where artists have started lawsuits aimed at preserving their street pieces or anyhow objecting to their erasure. The note also partially draws on semi-structured interviews I have conducted with several street artists and graffiti writers, whom I asked questions about whether they nurture interest in taking legal action for the above purposes.

Moral rights are protected in most countries of the world. They give creators of pieces that are protected by copyright (indeed, they are often incorporated in copyright statutes) a certain degree of control over the way their art is used by either the owner of the tangible medium that incorporates the piece (for example, a canvas as well as a wall) or by any other members of the public. Moral rights are protected at global level by the Berne Convention, an international treaty protecting copyright which was first adopted in 1886,¹ and introduced explicit protection of these rights in 1928 (the actual provision of this convention offering protection of moral rights is Article 6-*bis*).² The moral right of integrity is particularly relevant here, as it allows artists to oppose treatments of their works, such as mutilation or distortion, that are prejudicial to their honour or reputation.

In fine art scenarios, for example, mutilation may happen where a part of a canvas or of another artistic object is removed and the mutilated piece is then shown to the public. The case of Bernard Buffet's refrigerator is emblematic. Bernard Buffet, a well-known French expressionist painter, decorated a

refrigerator which was then sold at a fundraising event. The work was subsequently divided into six parts with the purpose of selling each piece separately (Merryman, 1976). A French court held this as a violation of the artist's integrity right and granted Bernard Buffet an injunction to prevent the sale of the said pieces.³

And what about distortion? This seems to refer to a physical modification of the artwork. However, some commentators suggest that distortion also occurs when the work is not physically modified, but when the message the artist tries to convey through her work is otherwise distorted by the treatment of the piece (Laddie, Prescott & Vitoria, 2011).

That said, I will here focus on cases where the moral right of integrity has been invoked to object to the destruction of street artworks, and on whether this right could also be enforced by artists should their works be removed from the original outdoor environment. In doing so, I will highlight the clash that may arise between the interests of artists and those of property owners.

Destruction of street and graffiti artworks and the artists' reaction

Street art and graffiti are often doomed to disappear relatively quickly.⁴ This has been a characterizing feature of these forms of art since their very beginning. As has been noted by Alison Young, their main factor is the constant physiological turnover of artworks that keeps cities in flux: as new images are created, others vanish (Young, 2014). And indeed, many street artists and graffiti writers that I have spoken to in the context of my ethnographic research have confirmed they are not bothered if and when their pieces disappear.

These artistic subcultures however are experiencing an evolution, as also shown by the seminal 5Pointz case, which I discuss below. Also, several artists I interviewed have admitted that they would try to fight a legal case to preserve their pieces, especially if they had easy access and the financial means to afford a lawyer. The desire to pursue legal action is stronger where artists create big (and legal) murals or are anyway involved in large projects, which require weeks of intense work. Conversely, and symmetrically, where the pieces have been created illegally (e.g., in case of graffiti bombing executed on trains, or tagging on city walls) such interest in legal protection is less pronounced, if not close to nil.

Thus, apart from hardcore illegal bombing and tagging, it seems that many street artists and graffiti writers are interested not just in relying on social norms to regulate creative processes within their subcultures – such norms, including the “don’t go over” rule typical of graffiti writers’ communities, have been analysed by Marta Iljadica in her book “Copyright Beyond Law” (Iljadica, 2016; Mubi-Brighenti, 2010); a growing number of them also take into consideration conventional legal routes to try to preserve their works.

The burgeoning interest of street and graffiti artists in legal tools aimed at conserving their works is reflected in a broader phenomenon, namely the increasing social acceptance of these forms of art. Indeed, as noted by Ronald Kramer, as opposed to the early days of these artistic movements (especially, graffiti bombing) when illegality was the rule, many artists within these communities nowadays produce their works legally, seeking social acceptance for their practice and creative outputs (Kramer, 2014; Schacter, 2016).

The 5Pointz case

Surprisingly, a jurisdiction that explicitly offers visual artists, including street and graffiti art practitioners, a right to prevent the destruction of their works (as a subset of the moral right of integrity) is the United States.⁵ The Visual Artists Rights Act (VARA) 1990 allows artists to oppose the destruction of pieces that have “recognized stature”. This requirement is a sort

of gate-keeping mechanism, being protection (against destruction) available just to artworks that art experts, the art community or society in general considers as having artistic merit, as clarified in the seminal case *Carter v. Helmsley-Spear Inc.*⁶

VARA has been recently tested in the case surrounding the demolition of 5Pointz, the well-known New York mural complex. Although the 5Pointz artists were not able to save the site from destruction in a preliminary proceedings which denied them an injunction,⁷ in February 2018 Judge Frederic Block of the New York District Court awarded a record sum of \$6.7 million to twenty-one 5Pointz graffiti and street artists in statutory damages (this is the highest amount ever awarded under VARA, and the first time these forms of art received such protection in the US).⁸ Not only did the judge find that the whitewashed artworks were of “recognized stature”; he also noted that the property owner had not served the 90 days’ written notice required under VARA and had thus wilfully and illegally destroyed the art placed on his building.

As far as the “recognized stature” requirement is concerned, the judge refused to apply the methodology proposed by the expert for the property owner who, citing his own words, “used an unduly restrictive interpretation of recognized stature that was more akin to a masterpiece standard”.⁹ In other words, following such approach, as Judge Block noted, only works made by artists like Caravaggio and Rembrandt would reach the “recognized stature” level.¹⁰ Instead, Block stressed that the 5Pointz artists could satisfy this condition simply by demonstrating their professional achievement and stature; this could include evidence of the placement of their works in movies, TV, blogs, and on-line videos as well as media coverage and social media presence. The judge also noted that even under the most restrictive of evidentiary standards the 45 pieces would still qualify as works of recognized stature: he indeed stressed that all the 45 artworks had also received sufficient academic recognition, having been appreciated by university professors, art teachers and other art experts.¹¹ He also took into account the artistic and social importance 5Pointz had acquired throughout the years and the highly credible testimony of the court-appointed expert. 5Pointz – Judge Block added – had become an attraction for New York visitors – with busloads of tourists, school children and weddings constantly heading to the site – under the brilliant supervision and selection skills of curator Meres One.¹²

The 5Pointz decision seems to mark a defining moment in the evolution of graffiti and street art – which have been long considered temporary artistic forms. Artists within these communities now seem more inclined to try to preserve their work and the high damages awarded in this case may convince other artists to take legal action against property owners who threaten destruction of their works. I do not believe that, as feared by several commentators

after the decision, property owners will now be more reluctant to allow graffiti and other murals to be painted on their walls. If building owners respect the procedures required by law (which was not the case in the 5Pointz case), they will not suffer any negative consequence. Furthermore, the main procedural requirement set forth by VARA – namely, serving 90 days' written notice to artists which allows them to remove their pieces¹³ – does not impose a very cumbersome burden on property owners. Once this step is taken, the latter are legally entitled to destroy the artwork.

Other cases involving muralists

The 5Pointz case has not been the only dispute in the US involving paintings placed on external walls. The following cases, most of which settled out-of-court, are also noteworthy.

(i) In 1986 the artist Jesus Campusano painted a mural on a building in San Francisco, assisted by three painters and his partner. After the building owner covered it in 1998, his partner and children sued under VARA in the California Northern District Court. They claimed the owner had not notified them about his intention to cover the mural; the case was then settled for \$200,000.¹⁴

(ii) In *Hanrahan v Ramirez*¹⁵ a group of young artists were authorised by the property owner to paint a mural carrying an anti-drug message on the side of a liquor store. Three years later the store owner whitewashed half of the mural, prompting the artists to take legal action. The court held in 1998 that the piece had recognized stature because it had won a national prize, received the local community's support, and had been displayed in a government building as a photograph. The judge awarded the artists £48,000 as compensation and ordered the restoration of the mural.

(iii) In 2006 the mural Edward Ruscha, painted by Kent Twitchell over the course of nine years in Los Angeles, was painted over with no preliminary notice being given to the artist. The latter sued the US government, which owned the building, and eleven other defendants for damages under VARA in the California Central District Court.¹⁶ Almost two years later the case settled for \$1.1 million.

(iv) The "recognized stature" requirement was debated again in *Henderson v Ziman*.¹⁷ In April 2014, the artist Victor Henderson started a legal action under VARA over the destruction of the mural, *Brooks Avenue Painting*, which he had co-created in 1969. Henderson claimed that his artwork had major historical significance. While Henderson seemed to have strong evidence showing that his mural was of recognized stature, the artist voluntarily abandoned the case.

(v) Muralist Dan Fontes painted an artwork on the side of an Oakland building in 1987. In 2015 he filed a suit in the California Northern District Court against the owners of the building after the tenant had whitewashed the mural without notifying the artist as required by VARA, and asked damages for \$400,000.¹⁸ The case was later settled.

(vi) In 2016 Katherine Craig sued real estate developer Princeton Enterprises after the latter had allegedly threatened to destroy her watercolor work named *The Illuminated Mural*. The artist had entered into an agreement with the previous owner, specifying that the artwork would remain on the building for at least 10 years. The case was later settled with an agreement that allowed the artwork to remain.¹⁹

(vii) In 2017 muralist Monte Thrasher sued several individuals and corporate defendants in the Central District of California claiming that they had painted over his *Six Heads* mural, without the artist's permission, and substituted it with another mural. The case is about the alleged violation of Thrasher's integrity and paternity rights and at the time of writing is still pending.²⁰

Artists vs property owners

As epitomised by the highlighted cases, relations between street artists and graffiti writers and the owners of the buildings upon which their works are placed may get tense. Two conflicting interests are at stake here: the interest of property owners who may want to get rid of the wall, and the interest of artists in preserving their pieces. Who should the law protect more strongly? A broad interpretation of artists' moral rights of integrity, so as to give them the possibility to preserve their art, would strongly protect their interests. Yet, it would remove the ability of private property owners to fully control their spaces.

Several factors should be taken into account when striking a balance between these two rights, including the existence of any agreement between the artist and the property owner, the length of time the artwork has been allowed to stay, the advantages obtained by the property owner from the piece, and the public interest served by the proposed new use of the property once the street artwork is removed (Marks 2015; Quaedvlieg 2008; Dreier 2008).²¹ For example, when refusing to issue an injunction to prevent the building owner from demolishing 5Pointz, the judge found a fair balance between the opposing interests. He noted that the general public's interest was served by the apartments that would replace the site, including the 75 affordable housing units.²² He also highlighted that the public's aesthetic interests had been addressed by the New York City Planning Commission, which in response to community pressure, required a 3,300 square feet of the exterior of the new buildings to be made available for street art as a condition for the issuance of the building permit.²³

One may also note that the position of property owners would be stronger when the artwork has been illegally placed on their buildings (this was not the case in 5Pointz, where the site's owner authorised artists to paint on the building's walls). The decision by a property owner to destroy or remove the piece of art indeed seems here reasonable and obviously justified on property rights grounds. Yet, whether a judge should always side with buildings' owners in these circumstances is far from certain.²⁴ What is certain is that in several countries such as US and UK, artists that place their works illegally in the street have been (and are currently) condemned for private nuisance, trespass to land, and criminal damage, and have faced (and face) jail time.

That said, there is little doubt that in certain circumstances artists should accept the fact that placing their works on other people's properties may carry the risk of losing control over them – even when they have been authorised or commissioned to do that. This may occur where property owners or other people or entities that treat their works do so in a proper and legal way, for example by following the formal procedure required by laws governing moral rights (see again the 90-days written notice required by VARA). Also, property owners may be obliged on safety grounds to remove a wall or other surfaces where artworks are placed. Artists' attempts to prevent the destruction of their artworks have sometimes been rejected by courts on safety grounds. This occurred for instance in the case of a monument (a sculpture made from old wooden blocks) placed in the Paul Mistral Park in the French town of Grenoble, which was subsequently deemed a threat to public safety because of deterioration.²⁵ Similarly, security staff at the Royal College of Art in London destroyed a student's artwork on safety grounds; the piece consisted of a stairway installed between the college's building and a nearby fish and chips shop (Cheng-Davies, 2016).

Removals and relocations of street artworks

Artists may also be interested in preventing their pieces from being taken from the street and brought into galleries, museums, or other indoor venues. Recent cases involving the 'surgical' removal and relocation of urban artworks originally placed in the street by famous artists, especially Banksy, have been widely reported and commented on (Hansen, 2016; Hansen & Flynn, 2015). These cases are controversial. Indeed, street art is often site-specific, which entails that a piece maintains its artistic meaning as long as it is kept in its original environment.²⁶ In other words, these forms of art are part of the cityscape, with the viewer, the original location and the artwork being inseparable: as Alison Young put it, street art and graffiti are being "written on the skin of the city" (Young, 2005). That said, removals and relocations of street artworks often bother and frustrate street artists as they are often perceived as unacceptable

attempts to not only distort the message conveyed by the artwork but also profit from pieces which are placed in urban environments with the aim of being freely enjoyed by members of the public.

No legal cases have yet been reported where artists have started a moral-right-based action to oppose such removals and relocations. In countries such as US and UK artists might not have many chances to successfully oppose removals and relocations of their pieces by relying on the moral right of integrity (this is mainly due to the way the relevant legal provisions have been drafted by legislators). According to current US case law, for example, moral rights cannot be enforced to save site-specific artworks.²⁷ Conversely, in other countries, including several continental European states such as the Netherlands,²⁸ Greece,²⁹ Spain,³⁰ Switzerland³¹ and Israel,³² local case law confirms that in certain circumstances the use of works in contexts different from the one initially chosen by the artists might be opposed on integrity right grounds. Therefore, in these countries (as well as other states that have a similar legal system), a judge may soon find a violation of this right should the artist successfully claim that the relocation of her street artwork in a different setting distorts the message she intended to deliver when selecting the placement of the art.

Removal of street artworks from the street may also lead to the piece being physically damaged. This is what happened to Banksy's 2009 *No Ball Games* mural painted on the side of a shop in the North London area of Tottenham. In 2013 the artwork was cut out from the wall, chopped in three parts and then auctioned at an estimated sale price of £500,000 in the controversial exhibition *Stealing Banksy?*, organised in 2014 by an organisation named Sincura Group. At the time of writing, the chopped pieces were still listed for sale on the Keszler Gallery website, in the US town of Southampton.

It is also worthwhile to highlight what happened to London artist Stik's 2011 artwork, originally placed in the Polish town of Gdańsk (the artist is famous for painting his iconic Stik figures in London and other towns around the world). The work featured a series of 53 Stik figures holding hands to celebrate the local community. It was painted, together with a group of young artists, on large metal shipping containers. Three years later, the entire piece disappeared, and in 2015 ten pieces of the containers resurfaced (representing 16 out of the 53 figures originally painted), chopped up and offered for sale at a gallery in West London for £10,000-12,000 per section (Herman 2015). The whole artwork was dismantled in different parts and the mutilated parts were offered for sale (this case reminds us of the refrigerator decorated by Bernard Buffet).

There seems to be little doubt that these operations amount to mutilations of the artworks (in the latter

case this is also confirmed by the fact that some dismantled Stik figures shown and offered for sale in the gallery had the final part of their arms cut).³³ If considered prejudicial to the reputation or honour of the artist, removals of street artworks which entail mutilation like the ones described above (and their exhibition) might be considered violations of the artist's integrity right in many countries of the world, including UK and US.

Conclusion

Street art and graffiti have long been considered ephemeral art forms. Many artists within these communities, from the New York kids who started the graffiti movement in the early 70s to today's modern street artists and graffiti writers, have believed and believe that the transient nature of their pieces is a structural element of these artistic forms. Yet, these subcultures are clearly experiencing an evolution, with more and more artists now interested in preserving their artistic outputs.

5Pointz is a case in point. Twenty-one artists that painted on the famous New York mural point asked a judge to block the property owner's plan to destroy their pieces and once the whitewashing happened, they sued him and requested (and obtained) damages. What the artist Miyakami said in her testimony during the trial is quite revealing. She said that when seeing her characters mutilated in that manner by the property owner's whitewashing, it "felt like [she] was raped".³⁴

Also, after being informed about the building owner's intention to demolish the site, 5Pointz curator Meres One filed an application with the New York City Landmark Preservation Commission, aiming to preserve the complex as a site of cultural significance (the attempt was not successful, though).³⁵ All these efforts epitomise the evolution that street art and graffiti subcultures are currently encountering.

I do believe the outcome in the 5Pointz case leads in the right direction. Judges in other countries should follow its path and, where artists have solid integrity right grounds, prevent property owners from destroying street artworks. Obviously, such decisions should be taken where all requirements under the relevant statutes are met and after taking into account the legitimate interests of property owners.

Also, most artists dislike attempts to remove their pieces from the street and relocate them to other settings, especially when this happens to extract profits. Decisions by judges to condemn such operations, where these relocations are prejudicial to the artist for distorting the original message and/or result in a mutilation of the artwork, would be welcome. As we have seen, the chances of that happening are currently higher in continental European countries and other states that have a similar legal system.

Finally, it is quite well-known that most street and graffiti art is anti-establishment. Artworks are often placed in the streets to oppose war, criticise consumerism and question the function of modern media (amongst other messages). Does the fact that artists may rely on moral rights laws to preserve their street pieces constitute a contradiction in terms? In other words, would it be paradoxical for street and graffiti artists to ask for protection from the very state they want to criticise? (Davies, 2012). I do not think so. Indeed, traditional works of art such as fine art paintings can also be anti-establishment, yet protecting them through moral rights laws certainly does not constitute a paradox, and actually many fine artists do so. Such 'traditional' artists have often the same motivations as most street and graffiti artists: "self-expression, peer recognition, and a desire to strike back at society" (Gomez, 1993).

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- 1 Berne Convention for the Protection of Literary and Artistic Works (September 9, 1886; revised July 24, 1971).
- 2 Article 6-bis of the Berne Convention offers authors the right “to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”
- 3 TGI Seine, 7 June 1960; CA 30 May 1962.
- 4 For example, street artworks may be removed from the owner of the house upon which they are placed, sometimes even accidentally. What happened in 2014 in the English town of Clacton-on-Sea is quite emblematic: indeed, the local council seemed to get it wrong when painting over a Banksy’s piece – showing a group of pigeons holding anti-immigration banners – which could have become a major touristic attraction (Shacter 2014).
- 5 Conversely, many continental European states – that have traditionally protected strongly such rights – have not incorporated in their statutes an explicit right to oppose the destruction of artworks. In these countries only case law has confirmed that artists can enforce this right in certain circumstances: this is the case of, for example, France and the Netherlands.
- 6 *Carter v. Helmsley-Spear Inc.* (861 F Supp 303 (SDNY 1994) and 71 F.3D 77 (2nd Cir 1995)).
- 7 *Cohen v. G & M Realty L.P.*, Case No. 13-CV-5612 (FB) (JMA) (EDNY 2013) (“Cohen I”), decision of 20 November 2013.
- 8 *Cohen et al. v G&M REALTY L.P. et al.*, Case No. 13-CV-05612(FB) (RLM) (“Cohen II”), decision of 12 February 2018.
- 9 See p. 31 of the decision (Cohen II).
- 10 See p. 32 of the decision (Cohen II).
- 11 See the Appendix of Judge Block’s decision of 13 June 2018, rejecting a motion by 5Pointz owner to set aside the Court’s findings of fact and conclusions of law and grant a new trial.
- 12 See p. 17 of the decision (Cohen II).
- 13 If the artwork incorporated in the building is not removable without damaging the piece, the property owner is still able to destroy it under the condition that artists have waived their moral rights through a written instrument signed by both the artist and building owner.
- 14 See University of Missouri-St. Louis hand-out from “The Artist as Entrepreneur” lessons, published at <http://www.umsl.edu/continuinged/artist/artist-lesson-VARA-ho2.htm> (last accessed 8 August 2018)
- 15 *Hanrahan v. Ramirez*, No. 2:97-CV-7470, 1998.
- 16 *Kent Twitchell v. West Coast General Corp et al.*, 06-cv-04857. (C.A.C.D. 2006)
- 17 *Henderson v Ziman*, No 2:14-cv-03042-SJO-AS (E.D. Cal. Apr. 21, 2014).
- 18 *Fontes v. Autocom Networks, Inc.*, C 15-02044 CRB (N.D. Cal. 2015).
- 19 On this case see <http://www.crainsdetroit.com/article/20170413/NEWS/170419900/colorful-9-story-mural-to-stay-on-milwaukee-junction-building-under> [Accessed 6 August 2018].
- 20 *Thrasher v. Siegel*, No. 2:17-cv-03047 (C.D. Cal. April 24, 2017).
- 21 Other factors that could be taken into account when striking the balance between the rights of artists and those of property owners, including the change of destination of the building; the necessary adaptation to modern functional requirements; the costs of maintenance and restoration; whether the owner commissioned the work; whether the owner is an organisation on which a moral duty lies to take good care of cultural heritage; and the public interest in monument preservation (Dreier 2008).
- 22 See p. 27 of Judge Block’s decision of 20 November 2013 (Cohen I).
- 23 See p. 27 of Judge Block’s decision of 20 November 2013 (Cohen I).
- 24 In the US case *Pollara v. Seymour* (206 F.Supp.2d 333, N.D.N.Y. 2002, aff’d on different grounds, 344 F.3d 265, 2d Cir. 2003), although it was concluded that the artwork was for the purpose of advertisement and therefore could not be protected under VARA, the court noted that “there is no basis in the statute to find a general right to destroy works of art that are on property without the permission of the owner”.
- 25 Trib. Adm. de Grenoble, 18 February 1976, in *Revue trimestrielle de droit comparé*, 1977, pp. 120 et ff.
- 26 See also Joe Epstein, ‘London Graffiti and Street Art: Unique Artwork From London’s Streets’ (Ebury Press 2014) (reporting the opinion of London artist Stik: “I try to make my characters react to the space they are painted in. It’s all about context for me”)
- 27 See the cases *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128 (1st Cir. 2006); *Kelley v. Chicago Park Dist.*, 635 F.3d 290 (7th Cir. 2011).
- 28 Even a minimum de-contextualization of an artwork was considered by a Dutch Court as infringing the integrity right: the court in particular found that a large mural painting which had been specifically designed to hang in a particular building at a height of 90 centimetres could not be hung at the height of 2.20 metres instead (Byrne-Sutton 1993).
- 29 The integrity right has been held as infringed in Greece when an artwork was placed in a location which contradicted its purpose and spirit, or where the work was unjustifiably transferred to a venue different from its original one: see Counsel of State, Decision No. 1465/1954, Themis, 1955, 174; Court of Appeal, Dodoni, Decision No. 47/1956, 861. See also *Antonia-Belika Koubareli v. Evangelos Volatas* [2003] ECDR 19, a decision enabling an author to rely on her moral rights to prevent the publication of her work in an offensive environment on the Internet.
- 30 In January 2013, the Spanish Supreme Court held that the relocation of a work by the Spanish sculptor Andrés Nagel violated the author’s moral right (Torsen Stech 2015).
- 31 Swiss case law has confirmed that a violation of the integrity right under Article 119 of the Swiss Copyright Act of 9 October 1992 may occur indirectly, namely when the work itself remains unchanged, but where the surroundings of the work are modified in a way that affects the author’s interests (de Werra 2010).
- 32 Israeli courts have been willing to accept claims against types of use that damaged the author because of the context in which the artwork was placed (Oron 2010).
- 33 This was confirmed to me by Stik during conversations held in May 2018.
- 34 See p. 46 of Judge Block’s decision of 12 February 2018.
- 35 The application was unsuccessful because the artworks had not been in existence for at least thirty years. The City of New York can designate a site under its Landmark’s Preservation Law; see N.Y.C. Admin. Code § 25–302(n) (defining “landmark” as “[a]ny improvement [to real property], any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation”).

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